

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVER BANCOULT, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 01-2629 (RMU)
)	
ROBERT S. McNAMARA, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

DEFENDANTS' RESPONSE TO PLAINTIFFS'
SUPPLEMENTAL MEMORANDUM ADDRESSING THE IMPACT
OF THE SUPREME COURT'S DECISION IN SOSA v. ALVAREZ-MACHAIN

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Pursuant to this Court's Order dated October 19, 2004, Defendants submit this Response to Plaintiffs' Supplemental Memorandum addressing the impact on this litigation of the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) ("*Sosa*").

INTRODUCTION

This action concerns the U.S. Navy Support Facility on the island of Diego Garcia. Diego Garcia is a part of the Chagos Archipelago, which in turn comprises the British Indian Ocean Territory, an Overseas Territory of the United Kingdom. Alleging that the Chagos Archipelago had an indigenous population ("the Chagossians") which was displaced to make way for the base, Plaintiffs brought this action against the United States and several current or former Federal officers. Plaintiffs claim that Defendants, acting in concert with the British Government, committed various violations of customary international law. Plaintiffs demand an award of damages, as well as injunctive and declaratory relief.¹

FACTS AND LOWER COURT PROCEEDINGS IN *SOSA*

Sosa arose out of the abduction of Humberto Alvarez-Machain (Alvarez), a Mexican national who had been indicted by a Federal grand jury for the kidnapping and murder of an agent of the Drug Enforcement Agency (DEA) on assignment in Mexico. At the behest of DEA officials, Alvarez was abducted in Mexico by several Mexican citizens and flown by private plane to the United States, where he was turned over to Federal law enforcement personnel. The case against Alvarez eventually proceeded to trial, at which the district court granted a defense motion for a judgment of acquittal.

¹Pursuant to 28 U.S.C. § 2679(d)(1), certifications have been filed that each of the current or former Federal officers named as Defendants was acting within the scope of his office or employment at the time of the incidents out of which Plaintiffs' claims arose. *See also* 28 U.S.C. § 2679(d)(4) ("Upon certification, any action or proceeding subject to paragraph (1) * * * shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.").

After returning to Mexico, Alvarez commenced an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.* Alleging jurisdiction under the Alien Tort Statute (ATS), 28 U.S.C. 1350, Alvarez also sought damages from the DEA agents who planned and approved his abduction, as well as from Francisco Sosa, one of the Mexican citizens who carried it out. After substituting the United States for the defendant DEA agents pursuant to 28 U.S.C. § 2679(d)(1),² the district court dismissed all the claims against the United States under the FTCA. With respect to the ATS claim against Sosa, however, the district court granted Alvarez summary judgment and awarded him \$25,000 in damages.

Both Alvarez and Sosa appealed, and a three-judge panel of the Ninth Circuit affirmed in part and reversed in part. *See Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001). On rehearing *en banc*, a closely divided court of appeals reached substantially the same conclusions as had the panel. *See Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003) (*en banc*). Affirming the award of damages against Sosa, it concluded that Alvarez's claim for arbitrary detention was actionable under the ATS. *Id.* at 631. The court also affirmed the substitution of the United States as the sole defendant with respect to Alvarez's ATS claims against the DEA agents. *Id.* at 631-32. Finally, the court reversed the dismissal of the claims against the United States, ruling that the FTCA's foreign country exception, 28 U.S.C. § 2680(k), was inapplicable because the wrongful conduct (the planning and approval of Alvarez's abduction) took place within the United States. *Id.* at 638-39.

²The district court denied Sosa's motion for substitution on the grounds that he was not an employee of the Government. *See Alvarez-Machain v. United States*, No. CV 93-4072 SVW (SHx) (C.D. Cal. Mar. 18, 1999), *reprinted in* Appendix to the Petition for Writ of Certiorari in *United States v. Alvarez-Machain*, S.Ct. No. 03-435 at 157a, 158a-167a.

THE SUPREME COURT'S DECISION IN *SOSA*

The Supreme Court decided two issues in *Sosa*: (1) whether Alvarez's allegations that DEA instigated his abduction from Mexico supported a claim for damages against the United States under the FTCA; and (2) whether he could recover damages from Sosa under the ATS. *Sosa*, 124 S.Ct. at 2746. Reversing the court of appeals' judgment on both points, the Supreme Court held that Alvarez was entitled to recover damages under neither of these statutes. *Ibid.*

With regard to the first issue, the Supreme Court repudiated the so-called "headquarters doctrine," under which the Ninth Circuit and other courts of appeals had held that the FTCA's foreign country exception was inapplicable to suits for wrongful conduct which occurs within the United States but has its operative effect in another country. *See* 124 S.Ct. at 2748 & n.2 (citing *Sami v. United States*, 617 F.2d 755, 761 (D.C. Cir. 1979); *Cominotto v. United States*, 802 F.2d 1127, 1130 (9th Cir. 1986); *Couzado v. United States*, 105 F.3d 1389, 1396 (11th Cir. 1997)). In concluding that the headquarters doctrine "should have no part in applying the foreign country exception," 124 S.Ct. at 2754, the Supreme Court flatly held that 28 U.S.C. § 2680(k) "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Ibid.*

Turning to the second issue, the Supreme Court held that Alvarez had no right to an award of damages against Sosa under the ATS. Noting that the statute originally was enacted as part of the Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 79, the Court specifically rejected as "implausible" Alvarez's assertion that "the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law." *Sosa*, 124 S.Ct. at 2755. In reaching this conclusion, the Court relied on the original language of the statute, which "gave the district courts 'cognizance'

of certain causes of action, and bespoke a grant of jurisdiction, not power to mold substantive law.” *Ibid.*

However, the Supreme Court also rejected the notion that “the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing the adoption of causes of action.” 124 S.Ct. at 2755. In so concluding, the Court emphasized the statute’s relation to other legislation passed during the First Congress to criminalize three categories of offenses against the law of nations, offenses which also had been made crimes under English law. *See id.* at 2756 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769); *id.*, at 2759 (“[T]he First Congress was attentive enough to the law of nations to recognize certain offenses expressly as criminal, including the three mentioned by Blackstone.”)).

Citing these statutes, as well as the extensive scholarly literature, the Supreme Court stated that, although “a consensus understanding of what Congress intended [in enacting the ATS] has proven elusive,” 124 S.Ct. at 2758,

the history does tend to support two propositions. First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.

* * *

The second inference to be drawn from this history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors, *see* [Act for the Punishment of Certain Crimes Against the United States, § 28, 1 Stat.] at 118; violations of safe conduct were probably understood to be actionable, *ibid.*; and individual actions arising out of prize captures and piracy may well have also been contemplated. *Id.*, [§ 8, 1 Stat.] at 113-114. But the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims.

Id., at 2758-59.

Furthermore, while it declined to completely “close the door to further independent judicial recognition of actionable international norms,” 124 S.Ct. at 2764, the Court made clear that great caution should be exercised before recognizing any new causes of action under the ATS:

[T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the 18th century paradigms we have recognized. This requirement is fatal to Alvarez’s claim.

124 S.Ct. at 2761. The Court further noted that the “requirement of clear definition” it applied in rejecting Alvarez’s claim “is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this case.” *Id.* at 2766 n.21. Thus, the Court made clear that it was not purporting to decide what other criteria a claim might be required to meet in order to be actionable under the ATS.³

In holding that Alvarez’s claim for arbitrary detention was not actionable under the ATS, the Court specifically rejected his contention that the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), and article 9 of the International Covenant on Civil and Political Rights, Dec. 19, 1996, 999 U.N.T.S. 171 themselves established the relevant rule of international law. 124 S.Ct. at 2767. The Court held that the Declaration does not of its own force impose obligations as a matter of international law; furthermore, while the Covenant is binding as a matter of international law, it was ratified

³The Court also made clear that the jurisdiction to entertain common law claims derived from international law is confined to 28 U.S.C. § 1350, and does not extend to other grants of jurisdiction, such as 28 U.S.C. § 1331. *See Sosa*, 124 S.Ct. at 2765 n.19.

by the United States on the express understanding that it was not self-executing and therefore did not create any enforceable obligations in Federal courts. *Ibid.*

The Supreme Court went on to reject Alvarez's attempt to show that the prohibition against arbitrary arrest and detention had otherwise attained the status of binding customary international law. *Id.*, at 2767-68. Of particular note, Alvarez had argued that "courts that have addressed this issue have repeatedly held that arbitrary arrest and detention violate international law." Respondent Alvarez-Machain's Brief in S.Ct. No. 03-339 at 49 & n.50 (citing, *inter alia*, *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *Xuncax v. Gramajo*, 886 F.Supp. 162, 184-85 (D. Mass. 1995)). Specifically alluding to this citation of case-law in Alvarez's brief, the Court stated that this "authority from the federal courts, to the extent it supports Alvarez's position, reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today." 124 U.S. at 2768 n.27 (citing Brief for Respondent Alvarez-Machain at 49 n.50).⁴

IMPACT OF THE *SOSA* DECISION ON THIS LITIGATION

Plaintiffs' Damages Claims. Prior to the Supreme Court's decision in *Sosa*, the law of this Circuit allowed the FTCA's foreign country exception to be avoided by invoking the so-called headquarters doctrine. *See Sami v. United States*, 617 F.2d 755, 761 (D.C. Cir. 1979). In *Sosa*, the

⁴Referring to § 702 of the RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES, the Court further stated: "Even the Restatement's limits are only the beginning of the enquiry, because although it may be easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross the line with the certainty afforded by Blackstone's three common law offenses." *Sosa*, 124 S.Ct. at 2769.

Supreme Court expressly disapproved *Sami* and rejected any reliance on the headquarters doctrine in applying the foreign country exception. Under *Sosa*, the fact that wrongful acts or omissions may have been committed by Federal employees within the United States is no longer relevant. Instead, 28 U.S.C. § 2680(k) bars all claims against the United States “based on any injury occurring in a foreign country, regardless of where the tortious act or omission occurred.” *See Sosa*, 124 S.Ct. at 2754. In effect, *Sosa* closes off the last possible avenue that arguably had been open to Plaintiffs for the recovery of damages in this action. Accordingly, the United States should be substituted as the sole defendant pursuant to 28 U.S.C. § 2679(d)(1),⁵ and all Plaintiffs’ damages claims should be dismissed.

Plaintiffs’ Claims for Injunctive and Declaratory Relief. Because the second issue presented in *Sosa* involved a claim asserted against one of the citizens of Mexico who carried out Alvarez’s abduction, rather than a claim against the United States, and the only relief at issue was an award of damages, the Supreme Court had no occasion to express itself concerning whether, or under what circumstances, relief could be awarded under the ATS in an action *against the United States*, let alone whether *injunctive or declaratory relief* could be granted in such an action.

Nevertheless, the Supreme Court’s square holding in *Sosa* that the ATS is a “strictly jurisdictional”

⁵The Supreme Court in *Sosa* did nothing to disturb the judgment of the Ninth Circuit sitting *en banc* insofar as it affirmed the district court’s substitution of the United States as the sole defendant with respect to the claims Alvarez asserted against the DEA employees under the Alien Tort Statute. *See Alvarez-Machain v. United States*, 331 F.3d 604, 631-32 (9th Cir. 2003) (*en banc*) (“Because the United States is substituted for the DEA agents, we treat the [ATS] claims brought against the agents within the context of the FTCA.”), *rev’d on other grounds sub nom. Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004). This Court recently followed the Ninth Circuit’s holding regarding the availability of substitution with respect to ATS claims asserted against a Federal officer. *See Schneider v. Kissinger*, 310 F.Supp.2d 251, 266-67 (D. D.C. 2004). Accordingly, the United States is properly substituted for the individual defendants in this case, and the claims against those defendants should be dismissed.

statute, 124 S.Ct. at 2755, forecloses Plaintiffs' attempt to invoke the ATS as the substantive basis for their claims for injunctive or declaratory relief against the United States. *See also id.*, at 2761 (“[T]he ATS is a jurisdictional statute creating no new causes of action * * *.”); *id.*, at 2764 (“All Members of the Court agree that § 1350 is only jurisdictional.”).

Moreover, nothing in the language or legislative history of the ATS suggests that it was intended to apply in suits against the United States. To the contrary, as to claims for damages, the law of this Circuit – which the Supreme Court did not disturb in *Sosa* – is clear the ATS does not itself waive the sovereign immunity of the United States. *See Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 886 (D.C. Cir. 1992); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Saltany v. Reagan*, 702 F.Supp. 319, 321 & n.4 (D.C. 1988), *summarily aff'd in relevant part for reasons stated by district court and rev'd in other part*, 886 F.2d 438, 441 (D.C. Cir. 1989). *See also Pauling v. McElroy*, 276 F.2d 252, 253 n.2 (D.C. Cir. 1960) (claim for damages against United States cognizable, if at all, only under FTCA).

And while the sovereign immunity of the United States has been waived with respect to claims for relief other than money damages by the Administrative Procedure Act (APA), 5 U.S.C. § 702, the “absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity.” *U.S. Postal Service v. Flamingo Indus. (USA) Ltd.*, 124 S.Ct. 1321, 1327 (2004); *Sea-Land Services, Inc. v. Alaska R.R.*, 659 F.2d 243, 245 (D.C. Cir. 1981) (Ginsburg, J.). Thus, in *Sea-Land Services*, the United States Court of Appeals for the District of Columbia Circuit held that injunctive relief could not be granted in an APA action based on allegations that a Federal agency had violated the Sherman Act. *See id.*, at 245 (“The Sherman Act, we conclude, does not expose United

States instrumentalities to liability, whether legal or equitable in character, for conduct alleged to violate antitrust constraints.”).

Noting that the Sherman Act (like the ATS) is silent with regard to whether it can be applied against the Federal Government, the court of appeals refused to infer a private cause of action against the United States based on such silence. *See id.*, at 247. Here, likewise, Plaintiffs can point to no “clear statement [in the ATS] subjecting the United States to a private action.” *Ibid.* Accordingly, the ATS cannot serve as the substantive basis of liability upon which injunctive or declaratory relief can be granted against the United States.

In any event, Plaintiffs cannot possibly meet the requirement of clear definition that the Supreme Court held must be satisfied before a new private causes of action can be recognized under the ATS. *See Sosa*, 124 S.Ct. at 2765 (“Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognized private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”).

Plaintiffs assert that Defendants committed various human right violations. These assertions are nothing more than “sweeping legal conclusions cast in the form of factual allegations.” *Pauling v. McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960). As such, they need not be taken as true by either the Court or Defendants. *See Bancoult v. McNamara*, 227 F.Supp.2d 144, 146 n.2 (D.D.C. 2002). Defendants categorically deny them. Because the facts actually alleged by Plaintiffs do not support these legal conclusions, the Court need not reach the issue of which of these human rights claims would be actionable under the ATS.

Instead, what Plaintiffs have alleged – that at the behest of the United States, the British Government detached the British Indian Ocean Territory from Mauritius and Seychelles; that the copra plantations on which the Chagossian people had depended for their subsistence were then allowed to wind down and eventually were closed; that the Chagossian people were moved from the B.I.O.T. to Mauritius and Seychelles, from which places they or their families had originated; and that they have been prevented from returning to the B.I.O.T. – simply does not make out a violation of an international norm that is accepted by the civilized world and defined with a specificity comparable to that of the 18th century paradigms cited by the Supreme Court in *Sosa*.

The Court made clear that “the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause of action available to litigants in the federal courts.” *Sosa*, 124 S.Ct. 2766. The practical consequences of recognizing the private cause of action urged by Plaintiffs and granting them the relief they request would be simply breathtaking. The United Kingdom retains sovereignty over the British Indian Ocean Territory, access to which is restricted by British law.⁶ The ATS

⁶In the wake of the decision in *Regina (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, 2 W.L.R. 1219, 2000 WL 1629583 (Q.B.D. Nov. 3, 2000), as well as the terrorist attacks of September 11, 2001, the British Government has issued two new Orders in Council concerning immigration controls over the islands of the British Indian Ocean Territory. In the official statement informing the House of Commons of these developments, the British Government stated that it had determined that allowing the former inhabitants to resettle the outer islands is not feasible and that it had concluded:

It would be impossible for the Government to promote or even permit resettlement to take place. After long and careful study, we have therefore decided to legislate to prevent it.

Equally, restoration of full immigration control over the entire territory is necessary to ensure and maintain the availability and effective use of the territory for defence purposes, for which it was in fact constituted and set aside in accordance with the UK’s treaty obligations entered into almost 40 years ago. Especially in light of recent developments in the

(continued...)

was not intended to serve as a vehicle for challenging the British Government's decisions regarding the defense needs of the United Kingdom, or its control over its own territory. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436-37 (1989) (claim cannot be asserted under ATS against foreign state).

Indeed, the Court in *Sosa* stressed the need to defer to the Executive and Legislative Branches in the management of foreign affairs, particularly in cases in which courts are called upon to "limit * * * the power of foreign governments over their own citizens, and to hold that a foreign government or its agents has transgressed those limits." *Sosa*, 124 S.Ct. at 2763. *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-32 (1964) (under Act of State doctrine, federal court will not examine validity of taking of property by foreign government within its own territory, even if complaint alleges that taking violates customary international law). This case perfectly illustrates the need for such deference.

⁶(...continued)

international security climate since the November 2000 judgment, this is a factor to which due weight has been given.

It was for these reasons that on 10 June 2004 Her Majesty made two Orders in Council, the combined effect of which is to restore full immigration control over all islands of the British Indian Ocean Territory. These controls extend to all persons, including members of the Chagossian community.

The first of these two orders replaces the existing constitution of the territory and makes clear, as a principle of the constitution, that no person has a right of abode in the territory or has unrestricted access to any part of it. The second replaces the existing immigration ordinance of the territory and contains the detailed provisions giving effect to that principle and setting out the necessary immigration controls. These two orders restore the legal position to what it had been understood to be before the High Court decision of 3 November 2000.

Written Ministerial Statement by Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, Commons Hansard Daily Debates, June 15, 2004, cols. 33-34WS. Available at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/cm040615/wmstext/40615m03.htm#40615m03.html_dpthd0 (last visited November 5, 2004).

It is precisely in cases such as this one that the courts should be “particularly wary of impinging on the discretion of the Executive and Legislative Branches in managing foreign affairs.” *Ibid.*

Apart from the requirement of clear definition, the Supreme Court added that another possible limitation on the exercise of jurisdiction under the ATS, which it had no occasion to apply in *Sosa*, “is a policy of case-specific deference to the political branches.” *Id.*, at 2766 n.21. “In such cases,” the Court noted, “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.” *Ibid.* Again, the particular circumstances of this case make it an appropriate one for such deference.

Finally, as the Supreme Court reaffirmed in *Sosa*, the law of the United States incorporates customary international law only in the absence of a “controlling executive or legislative act.” 124 S.Ct. at 2766-67 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). See also *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814); *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959); *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988); *Gisbert v. U.S. Att’y General*, 988 F.2d 1437, 1447-48 (5th Cir. 1993); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir. 1986). Here, controlling executive and legislative acts preclude Plaintiffs’ reliance on principles of customary international law.

As this Court is aware, the United States and the United Kingdom have entered into Executive Agreements under which access to Diego Garcia is restricted.⁷ Furthermore, the establishment of the U.S.

⁷Under supplemental agreements by which the United Kingdom consented to the establishment of a limited naval communications facility on Diego Garcia in 1972, and the current naval support facility in 1976, access to the island is restricted to members of the armed forces of the United States and the United Kingdom, public officers in the service of the British Indian Ocean Territory, representatives of the two
(continued...)

Navy Support Facility at Diego Garcia was allowed to proceed by Congress only after the President himself evaluated all the military and foreign policy implications of establishing a base there, and certified that the base was essential to the national interests of the United States.⁸ After Congress received this certification by the President, a Special Subcommittee of the House Committee on International Relations convened hearings at which representatives of the Departments of State and Defense appeared and testified concerning the need for the expanded defense facilities on Diego Garcia, specifically addressing criticism regarding the removal of the island's former inhabitants.⁹ And despite the concern over the treatment of the island's former inhabitants, Congress not only declined to rescind its authorization for the establishment of the defense facilities on Diego Garcia, but in the years since has authorized the expenditure of several hundreds of millions of dollars for further expansion of the base.¹⁰ In these circumstance, Plaintiffs cannot

⁷(...continued)

Governments, and contractor personnel. See Agreement of October 24, 1972, Concerning Naval Communications Facility on Diego Garcia, 23 U.S.T. 3087, T.I.A.S. No. 7481; Agreement of February 25, 1976, Concerning Naval Support Facility on Diego Garcia, 27 U.S.T. 315, T.I.A.S. No. 8230.

⁸See Military Construction Authorization Act, 1975, Pub. Law 93-552, § 613(a)(1), 88 Stat. 1766. On May 12, 1975, the Congress received the following Message from the President:

In accordance with Section 613(a)(1)(A) of the Military Construction Authorization Act, 1975 (Public Law 93-552), I have evaluated all the military and foreign policy implications regarding the need for United States facilities at Diego Garcia. On the basis of this evaluation and in accordance with Section 613(a)(1)(B), I hereby certify that the construction of such facilities is essential to the national interest of the United States.

H. Doc. No. 94-140, 94th Cong., 1st Sess.

⁹See *Diego Garcia, 1975; The Debate Over the Base and the Island's Former Inhabitants: Hearings Before the Special Subcommittee on Investigations of the Committee on International Relations of the House of Representatives*, 94th Cong., 1st Sess. 1, 59-81 (1975).

¹⁰See, e.g., Act of Dec. 2, 2002, Pub. Law 107-314, § 2201(b), 116 Stat. 2687; Act of Oct. 5, 1999, Pub. Law 106-65, § 2201(b), 113 Stat. 829; Act of Dec. 5, 1991, Pub. Law 102-90, § 2401(b), 105 Stat. 1530; Act of Dec. 4, 1987, Pub. Law 100-180, § 2121(b), 101 Stat. 1189; Act of Dec. 3, 1985, Pub. Law 99-167, (continued...)

invoke principles of customary international law to challenge the decisions of the Executive and Legislative Branches.¹¹

¹⁰(...continued)

§ 201(b), 99 Stat. 970; Act of Aug. 28, 1984, Pub. Law 98-407, § 201, 98 Stat. 1502; Act of Oct. 11, 1983, Pub. Law 98-115, § 201, 97 Stat. 763; Act of Oct. 15, 1982, Pub. Law 97-321, § 201, 96 Stat. 1555; Act of Dec. 23, 1981, Pub. Law 97-99, § 201, 95 Stat. 1365; Act of Oct. 10, 1980, Pub. Law 96-418, § 201, 94 Stat. 1755.

¹¹See also *O'Reilly de Camara v. Brooke*, 209 U.S. 45, 52 (1908) (per Holmes, J.) (“[W]here, as here, the jurisdiction of the case depends upon the establishment of a ‘tort only in violation of the law of nations, or a treaty of the United States,’ it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act.”). Furthermore, as the United States has established in prior briefing, Plaintiffs’ claims present nonjusticiable political questions. See also *Schneider v. Kissinger*, 310 F.Supp2d 251, 259-63 (D.D.C. 2004). In addition, even assuming that the ATS provides Plaintiffs with causes of action under the circumstances alleged, it would be an abuse of discretion to grant Plaintiffs injunctive or declaratory relief. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207-08 (D.C. Cir. 1985).

CONCLUSION

For the reasons stated, the Supreme Court's decision in *Sosa* sounds the death knell for all Plaintiffs' claims. Accordingly, the United States should be substituted as the sole Defendant, and this action should be dismissed.

DATED this 9th day of November, 2004.


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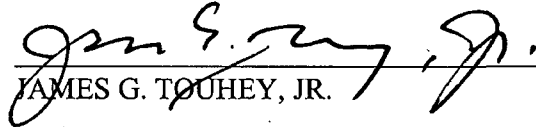

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2004, I served the foregoing Defendant's Response to Plaintiffs' Supplemental Memorandum Addressing the Impact of the Supreme Court's Decision in *Sosa v. Alvarez-Machain*, by electronic transmission and telecopier on the following counsel for Plaintiffs.

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